

# 2021 ADVANCED DUI TRIAL ADVOCACY

September 20 – September 22, 2021  
Phoenix, Arizona



**Tuesday, September 21, 2021**

## **Proposition 207 Update and Tips**

Presented by:

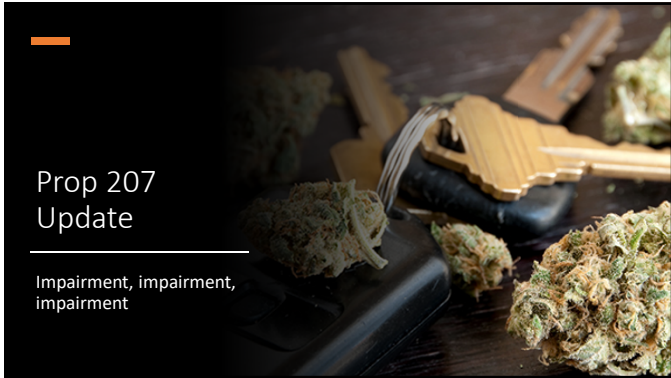
**Jared Johnson**

Prop 207 TSRP, City of Scottsdale and GOHS

Distributed by:

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EXECUTIVE DIRECTOR



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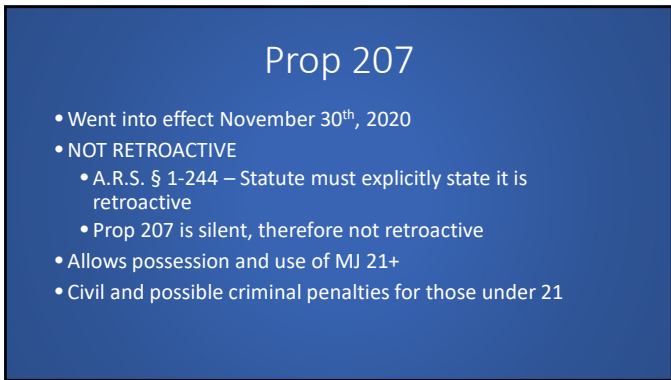
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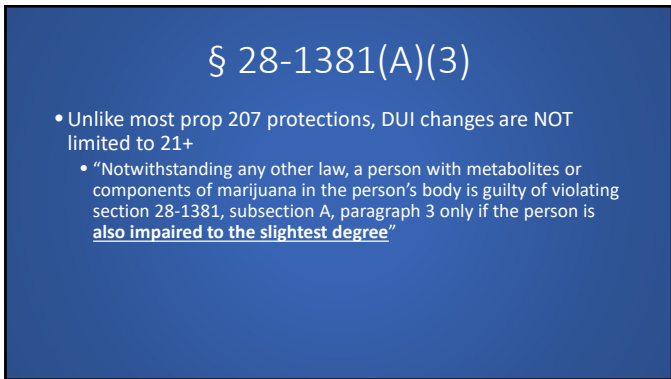
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## § 28-1381(A)(3)

- Unlike most prop 207 protections, DUI changes are NOT limited to 21+
  - “Notwithstanding any other law, a person with metabolites or components of marijuana in the person’s body is guilty of violating section 28-1381, subsection A, paragraph 3 only if the person is also impaired to the slightest degree”
- END OF THE (A)(3)?

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## § 28-1381(A)(3)

- Medical Marijuana defense is dead
- Still some uncertainty about whether Prop 207 adds an additional element (impairment) or whether it is an affirmative defense

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## Affirmative Defenses

- Medical Marijuana defense is dead
- Still some uncertainty about whether Prop 207 adds an additional element (impairment) or whether it is an affirmative defense
- If it is an affirmative defense it does put the burden on the defense to prove by a preponderance that the Defendant was not impaired.

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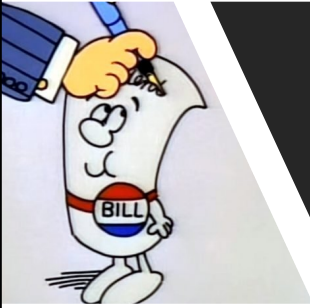
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## HB 2171

Amending Certain Arizona Reviewed Statutes Related to Marijuana Violations in Support of Proposition 207

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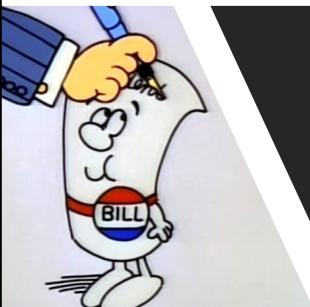
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## HB 2171

- 2171 furthers Proposition 207 by integrating certain provisions of Proposition 207 into the current law.
- The bill does not otherwise in any way alter Proposition 207.

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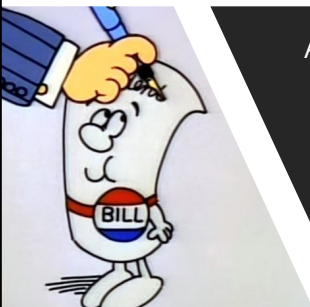
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## A.R.S. § 8-202

- Extends juvenile court jurisdiction to include civil marijuana violations.
- All civil and criminal marijuana offense involving juveniles should be filed in juvenile court. The county presiding judge may choose to decline jurisdiction of civil marijuana violations as many counties have done for juvenile traffic violations.
- However, until such a declination has been made, juvenile civil and criminal marijuana offenses cannot be filed in municipal or justice courts.

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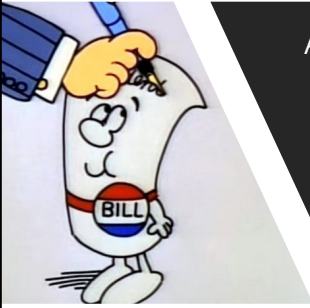
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**A.R.S. § 8-323**

- Allows juvenile hearing officers in municipal and justice courts to hear juvenile civil marijuana cases.
- As noted above, juvenile civil marijuana citations may only be cited in those courts if the county juvenile court has declined jurisdiction.
- Maricopa County Superior Court has elected to keep these cases for now.

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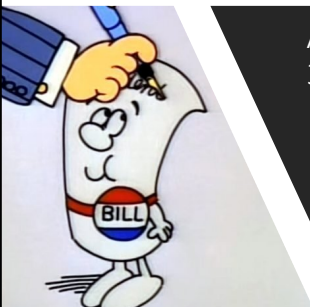
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**A.R.S. § 13-3405, 3408, 3415**

- Possession of marijuana, marijuana products, and marijuana paraphernalia covered by Proposition 207 are excluded from prosecution under these statutes.

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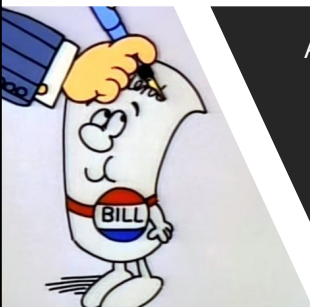
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**A.R.S. § 22-701**

- Grants jurisdiction to justice courts and municipal courts to hear civil marijuana violation cases.
- Hearing officers appointed pursuant to section § 28-1553 may also hear civil marijuana cases.

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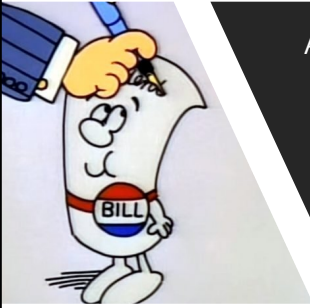
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### A.R.S. § 22-701

- Civil marijuana cases may be initiated by a uniform traffic ticket and complaint (UTT) issued by a peace officer.
- Civil marijuana cases must be filed within 60 days after the alleged violation and shall be served within ninety days after the filing date.

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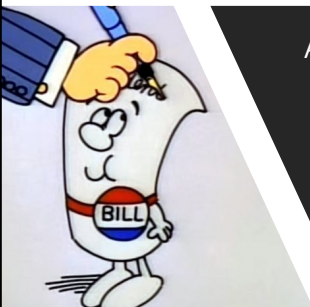
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### A.R.S. § 22-701

- A complaint alleging a civil marijuana violation may be served by delivering a copy of the UTT to the person who is charged with the violation or by any means authorized by the Arizona Rules of Civil Procedure.
- Non-juvenile minors (18-20) committing a civil marijuana violation should be cited into city court.

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## Justification

- SB 1261
- Vetoed by Governor Ducey on April 26, 2021
- Rosenstein Law Firm



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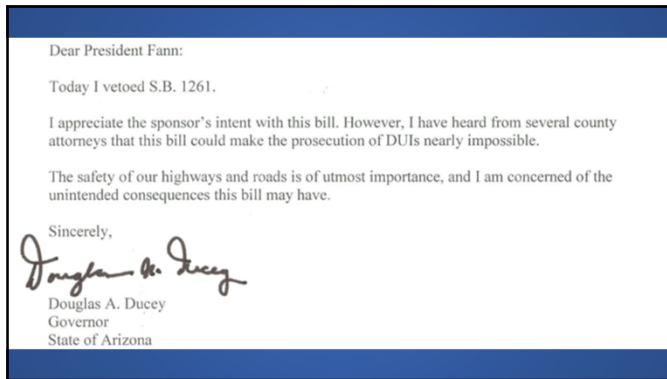
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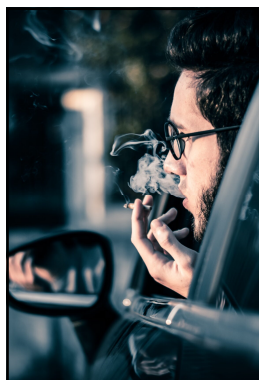
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### Reasonable Suspicion

- A.R.S. § 36-2852
  - (C) Notwithstanding any other law, the odor of marijuana or burnt marijuana does not by itself constitute reasonable articulable suspicion of a crime. This subsection **does not apply** when a law enforcement officer is investigating whether a person has violated section 28-1381.

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### *State v. Tagge* 246 Ariz. 486 (App. 2019)

- Defendant's caught smoking medical marijuana in a parked car
- Car was parked in a lot owned by the City of Mesa
- Question on appeal was what constitutes a "public place"

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*State v. Tagge*  
246 Ariz. 486 (App. 2019)

- Defendant's argued that "public place" was defined narrowly in the Smoke-Free Arizona Act.
- Court rejected that definition and used the common understanding of "public place" as a place open to or frequented by the general public.
- As you will see, this ruling isn't helpful under Prop 207.

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## Reasonable Suspicion

- A.R.S. § 36-2851(8)
  - Does not allow any person to: (a) Smoke marijuana in a public place or open space. (b) Consume marijuana or marijuana products while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle, boat, vessel, aircraft or another vehicle used for transportation.

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## Reasonable Suspicion

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  - Does not allow any person to: (a) Smoke marijuana in a public place or open space. (b) Consume marijuana or marijuana products while driving, operating or riding in the passenger seat or compartment of an operating motor vehicle, boat, vessel, aircraft or another vehicle used for transportation.
- Open Space
  - A.R.S. § 36-2850(22) – a public park, public sidewalk, public walkway or public pedestrian thoroughfare

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### Reasonable Suspicion

- Public Place
  - Same meaning prescribed in the smoke-free Arizona Act 36-601.01
  - "Public place" means any enclosed area to which the public is invited or in which the public is permitted, including airports, banks, bars, common areas of apartment buildings, condominiums or other multifamily housing facilities, educational facilities, entertainment facilities or venues, health care facilities, hotel and motel common areas, laundromats, public transportation facilities, reception areas, restaurants, retail food production and marketing establishments, retail service establishments, retail stores, shopping malls, sports facilities, theaters, and waiting rooms. A private residence is not a "public place" unless it is used as a child care, adult day care, or health care facility.

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### Reasonable Suspicion

- Fresh vs. burnt

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### Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an "operating" vehicle

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## Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle
- A.R.S. 28-101(22)
  - Drive – “means to operate or be in actual physical control of a motor vehicle”

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## Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle
- A.R.S. 28-101(22)
  - Drive – “means to operate or be in actual physical control of a motor vehicle”
- Parked Car Problem
  - Most parking lots are arguable not “enclosed”
  - Parked car is not being operated

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## Reasonable Suspicion

- Fresh vs. burnt
- Prohibited to smoke in an “operating” vehicle
- A.R.S. 28-101(22)
  - Drive – “means to operate or be in actual physical control of a motor vehicle”
- Parked Car Problem
  - Most parking lots are arguable not “enclosed”
  - Parked car is not being operated
  - If stuck, check the city code

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Reasonable Suspicion

- A.R.S. § 22-701
  - Gives officers authority to stop and detain a person as is reasonably necessary to investigate an actual or suspected violation of a civil marijuana offense and to serve a copy of the complaint.



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Why nanograms don't matter

- No direct correlation between active THC and impairment



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Why nanograms don't matter

- No direct correlation between active THC and impairment
- THC peaks within minutes of ingestion (if smoked)



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### Why nanograms don't matter

- No direct correlation between active THC and impairment
- THC peaks within minutes of ingestion (if smoked)
- Peak impairment occurs 40 minutes or more after smoking



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### Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)



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### Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)
- Prop 207 prohibits AZ from adopting a per se standard



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## Why nanograms don't matter

- Arizona has no per se for THC (CO 5ng)
- Prop 207 prohibits AZ from adopting a per se standard
- NHTSA is not likely to recommend a per se standard anytime soon



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## Why not adopting a per se standard can be a good thing

- Consistent with the science

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## Why not adopting a per se standard can be a good thing

- Consistent with the science
- Cases where THC is below threshold but significant impairment

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## Why not adopting a per se standard can be a good thing

- Consistent with the science
- Cases where THC is below threshold but significant impairment observed
- Allows us limit arguing the nanograms

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## Why not adopting a per se standard can be a good thing

- Consistent with the science
- Cases where THC is below threshold but significant impairment observed
- Allows us to limit arguing the nanograms
  - No scientific basis to correlate results to impairment
  - Removes juror confusion
  - Avoids outside influence
  - Prevents defense from soliciting improper testimony and making improper argument about what the nanogram results mean

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## When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)



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### When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)
- Carboxy-THC not impairing



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### When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)
- Carboxy-THC not impairing
- Can remain in system up to a month



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### When nanograms do matter

- *State ex. Rel. Montgomery v. Harris* 234 Ariz. 343 (2014)
- Carboxy-THC not impairing
- Can remain in system up to a month
- Therefore not evidence of recent use



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## When nanograms do matter

- Lab threshold
  - Each lab is different



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## When nanograms do matter

- Lab threshold
  - Each lab is different
  - If it detects THC but below threshold won't report THC quantitative results



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## When nanograms do matter

- Lab threshold
  - Each lab is different
  - If it detects THC but below threshold won't report THC quantitative results
  - Without active THC we fail under both A(1) and A(3)



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